(2009) 09 DEL CK 0380

Delhi High Court

Case No: Writ Petition (Civil) No. 8741 of 2008

Asahi Glass India		APPELLANT
	Vs	
Director General of Investigation and Registration		RESPONDENT

Date of Decision: Sept. 25, 2009

Acts Referred:

- Companies Act, 1956 - Section 240, 240A
- Constitution of India, 1950 - Article 14, 226
- Income Tax Act, 1961 - Section 142(2A)
- Monopolies and Restrictive Trade Practices Act, 1969 - Section 10, 11, 11(1), 11(2), 11(3)

Hon'ble Judges: Sanjiv Khanna, J

Bench: Single Bench

Advocate: C.A. Sundaram, Rohini Musa, Abhisekh Gupta, Zafar Inayat, Anandh Kannan, Jasleen Oberoi and Monark Gahlot, for the Appellant; Maneesha Dhir, Preeti Dalal and R.D. Makhija, for the Respondent

Final Decision: Dismissed

Judgement

Sanjiv Khanna, J.

The petitioner, Asahi India Glass Limited, by the present writ petition seeks quashing of letters dated 17th September, 2008 and 19th November, 2008 issued by Director General of Investigation and Registration under the Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter referred to as the Act, for short). By the aforesaid letters, the petitioner has been informed that investigation u/s 11(2) of the Act has been initiated by the said Directorate to ascertain facts on alleged objectionable trade practice of cartelization indulged by the float/flat glass manufacturers. The letter dated 17th September, 2008 refers to an article published in the magazine Outlook Business dated 6th-19th April, 2008 written by one Mr. Himar Arjun Singh.

2. After receipt of the letter dated 17th September, 2008, the petitioner by their letter dated 26th September, 2008 had initially asked for extension of time by eight weeks to furnish response with necessary documents with the averment that they had preliminary objection that the letter dated 17th Sept.,2008 was in the nature of a fishing and rowing inquiry. The respondent-Directorate by their letter dated 19th November, 2008 informed the petitioner that the time for furnishing required information/documents was extended upto 6th November, 2008 and in case information/documents were not furnished, action as envisaged u/s 49(1) read with Section 11(2) of the Act might be initiated against the petitioner and their Directors.

3. On 26th November, 2008, the petitioner objected to initiation u/s 11(2) of the Act and made allegations that the said notice had been issued on hearsay knowledge without any material or evidence to sustain it. It was alleged that the respondent-Directorate was guilty of non-application of mind and exceeding their jurisdiction. Allegation was made that the newspaper article and the enquiry had been initiated at the behest of float/flat glass importers against whom anti-dumping duties had been enforced. It was claimed that the information sought was proprietary and confidential in nature. Allegations of cartelization were denied. No information or documents as mentioned in the letter dated 17th September, 2008 were furnished and supplied.

4. The petitioner immediately thereafter on 8th December, 2008 filed the present writ petition and by the interim order dated 10th December, 2008 proceedings before the Directorate have been stayed.

5. Sections 10 and 11 of the Act read as under:

10. Inquiry into monopolistic or restrictive trade practices by Commission.-

The Commission may inquire into- (a) any restrictive trade practice-

(i) upon receiving a complaint of facts which constitute such practice [from any trade association or from any consumer or a registered consumer association, whether such consumer is a member of that consumers'' association or not], or

(ii) upon a reference made to it by the Central Government or a State Government, or

(iii) upon an application made to it by the [Director General], or

(iv) upon its own knowledge or information,

(b) any monopolistic trade practice, upon a reference made to it by the Central Government [or upon an application made to it by the Director General] or upon its own knowledge or information.

11. Investigation by Director General before issue of process in certain cases.-

(1) The Commission may, before issuing any process requiring the attendance of the person against whom an inquiry (other than an inquiry upon an application by the Director General) may be made u/s 10, by an order, require the Director General to make, or cause to be made, a preliminary investigation in such manner as it may direct and submit a report to the Commission to enable it to satisfy itself as to whether or not the matter requires to be inquired into.

(2) The Director General may, upon his own knowledge or information or on a complaint made to him, make, or cause to be made, a preliminary investigation in such manner as he may think fit to enable him to satisfy himself as to whether or not an application should be made by him to the Commission u/s 10.

(3) For the purpose of conducting the preliminary investigation under Sub-section (1), or Sub-section (2), as the case may be, the Director General or any other person making the investigation shall have the same powers as may be exercised by an Inspector under Sub-section (2) of Section 44.

(4) Any order or requisition made by a person making an investigation under Sub-section (1), or Sub-section (2), shall be enforced in the same manner as if it were an order or requisition made by an Inspector appointed u/s 240 or Section 240A of the Companies Act, 1956 (1 of 1956), and any contravention of such order or requisition shall be punishable in the same manner as if it were an order or requisition made by an Inspector appointed under the said Section 240 or Section 240.

6. Section 11(2) of the Act states that the Director General may upon his personal knowledge, information or on a complaint made to him, make, or cause to be made, a preliminary investigation to satisfy himself whether or not to make an application to the Commission u/s 10 of the Act. Section Monopolies and Restrictive Tr of the Act permits the Director General to conduct a fact finding enquiry to decide whether or not to move an application u/s 10 of the Act. Preliminary investigation can be started on the basis of personal knowledge, on information or complaint received. Section Monopolies and Restrictive Tr of the Act does not use the words "satisfaction", "in the opinion of", "reason to believe", etc., as a pre-condition for initiation of preliminary investigation by the Director General. Section Monopolies and Restrictive Tr of the Act gives discretion to the Director General to decide the manner in which the investigation is to be made. Sections 11(3) and (4) give powers to the Director General to ensure that information and documents required for the purpose of preliminary investigation can be collected.

7. There is a clear distinction between investigation under Sections 11(1) and (2) of the Act and initiation of proceeding u/s 10 of the Act. Sections 11(1) and (2) of the Act refer to preliminary investigation, which is an enquiry to find out true and correct facts. No one is accused at the said stage for the violation of the Act but the object and purpose is to find out whether allegations of alleged violation have any

substance or merit. Sections 11(1) and (2) of the Act permit and allow the Director General to carry out investigation as an authority established under the Act to verify and uncover the truth or mendaciousness of the allegations made or have come to the knowledge of the Director General or the Commission. It is not necessary to have a prelude or pre-investigation to decide whether or not to conduct preliminary investigation. Preliminary investigation is the starting point and not a mid point or the end point. It is, therefore, not correct to equate provisions of Sections 11(1) or 11(2) with Section 10 of the Act. Initiation of proceedings u/s 10 of the Act has an entirely different consequence, connotation and may be preceded with a preliminary investigation under Sections 11(1) or 11(2) of the Act. Preliminary enquiry and steps to collect information/documents cannot be treated at par and does not require satisfaction or formation of opinion, which is an essential pre-requisite for initiation of proceedings u/s 10 of the Act. Directorate has authority and power to resort to preliminary investigation or enquiry in order to enable them to decide whether or not to initiate statutory proceedings u/s 10 or other provisions under the Act. Preliminary enquiries/investigations are justified as initiation of substantive proceedings without preliminary investigation/enquiry can cause incalculable harm and injustice to persons against whom allegations are made (see in this regard observations expressed by G.K. Mittar, J. in P. Sirajuddin, etc. Vs. State of Madras, etc., and J.R. Mudholkar, J. in The State of Uttar Pradesh Vs. Bhagwant Kishore Joshi,

8. Section 11(2) of the Act does not require a copious or a detailed complaint. Cartelization is normally masked and camouflaged. Allegation with regard to violation of the provisions of the Act may come to the knowledge of the Director General from any source including his own knowledge. The Act deliberately and intentionally permits the Director General to act and make preliminary investigation in the manner he deems fit without putting the Director General under fetters or constraints. The investigations and manner/conduct thereof must be just and fair. The Director General being an authority or a State is required to act in a just and a fair manner and cannot act arbitrarily, contrary to Article 14 of the Constitution. Thus when the allegations by themselves even when accepted do not result in infringement of the Act or are per se absurd etc., Courts may interfere. These will be rare cases of total lack of jurisdiction or arbitrary exercise of jurisdiction.

9. In I.T.C. Ltd. Vs. M.R.T.P. Commission and Others, Company Cases 619 (Cal.), a single Judge of Calcutta High Court referred to Sections 10 and 11 of the Act and opined that preliminary investigation u/s 11 is in the nature of fact finding investigation to come to a prima facie conclusion whether or not further enquiry should be initiated. It is as prelude to the enquiry and enables the Director General to collect information, documents and material to reach a prima facie conclusion. At this stage, there is no question of any lis and there is no opposing party. The said decision and the observations were approved by a Division Bench of this Court in Ballarpur Industries Ltd. Vs. The Director General of Investigation and Registration,

Monopolies and Restrictive Trade Practices Commission and Others, . The Division Bench in the said case has observed as under:

The Calcutta High Court in I.T.C. Ltd. v. M.R.T.P. Commission 1975 Indlaw Cal 102 (Cal), is also of the view that the Commission''s jurisdiction to inquire into restrictive trade practices upon its own knowledge or information u/s 10(a)(iv) of the said Act is not restricted only to the information derived from a proceeding u/s 12(3) of the Act. Upon information derived from an invalid or irregular complaint or even from an anonymous letter or from a complaint made by less than twenty-five consumers, the Commission is competent to exercise its jurisdiction u/s 10(a)(iv) of the Act. It also held in this case that the provisions of Section 10(a) were mutually exclusive but that did not mean that any information derived from any source or even from an invalid complaint could not be used by the Commission as its own knowledge and information under Clause (iv) and that the only limitation was that there could not be any simultaneous inquiry on different alternatives enumerated in Section 10(a). In J.K. Synthetics Ltd. v. R.D. Saxena, Director of Investigation 1976 Indlaw All 70 (All), it was contended that an invalid complaint could not form the basis of its knowledge or information of the Commission so as to entitle it to take action u/s 10(a)(iv). The court held that this was not correct and that there was nothing in Section 10(a)(iv) to restrict the source of information or own knowledge of the Commission which could form the basis of suo motu action. The source and the manner in which this information was conveyed was of no consequence. The Commission could take action u/s 10(a)(iv) even on the basis of an invalid complaint.

10. There are number of cases in which the Supreme Court has held that courts should not normally entertain writ petitions against issue of show cause notice on the ground that initiation of proceedings to find out facts does not justify court interjection. The Supreme Court in Executive Engineer, Bihar State Housing Board Vs. Ramesh Kumar Singh and others, , has observed:

10. We are concerned in this case, with the entertainment of the writ petition against a show- cause notice issued by a competent statutory authority. It should be borne in mind that there is no attack against the vires of the statutory provisions governing the matter. No question of infringement of any fundamental right guaranteed by the Constitution is alleged or proved. It cannot be said that Ext. P-4 notice is ex facie a ''nullity'' or totally "without jurisdiction" in the traditional sense of that expression - that is to say, that even the commencement or initiation of the proceedings, on the face of it and without anything more, is totally unauthorized. In such a case, for entertaining a writ petition under Article 226 of the Constitution of India against a show cause notice, at that stage, it should be shown that the authority has no power or jurisdiction, to enter upon the enquiry in question. In all other cases, it is only appropriate that the party should avail of the alternate remedy and show cause against the same before the authority concerned and take up the objection regarding jurisdiction also, then. In the event of an adverse decision, it will

certainly be open to him to assail the same either in appeal or revision, as the case may be, or in appropriate cases, by invoking the jurisdiction under Article 226 of the Constitution of India.

11. Similar view has been also taken by the Supreme Court in The Special Director and Another Vs. Mohd. Ghulam Ghouse and Another, observing as under:

This Court in a large number of cases has deprecated the practice of the High Courts entertaining writ petitions questioning legality of the show cause notices stalling enquiries as proposed and retarding investigative process to find actual facts with the participation and in the presence of the parties. Unless, the High Court is satisfied that the show cause notice was totally non est in the eye of law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine, and the writ petitioner should invariably be directed to respond to the show cause notice and take all stands highlighted in the writ petition. Whether the show cause notice was founded on any legal premises is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could approach the Court. Further, when the Court passes an interim order it should be careful to see that the statutory functionaries specially and specifically constituted for the purpose are not denuded of powers and authority to initially decide the matter and ensure that ultimate relief which may or may not be finally granted in the writ petition is accorded to the writ petitioner even at the threshold by the interim protection, not granted.

12. In Union of India v. Kuni Setty Satya Narayana (2006) 12 SCC 228 it was held by the Supreme Court that ordinarily a writ petition should not be entertained against a mere show cause notice or charge sheet as the challenge is premature. Show cause notice or charge sheet is not an adverse order or something which constitutes a cause of action unless the same has been issued by a person having no jurisdiction. It was further observed that in a given situation the authority concerned may drop proceedings or hold that the charges are not established. A writ petition is maintainable only when a right of parties is infringed, which normally happens when a final order imposing punishment or having adverse effect is passed. Show cause notice by itself in most cases does not require interference unless it is found to be wholly without jurisdiction or wholly illegal. In Union of India (UOI) and Another Vs. Vicco Laboratories, , the Supreme Court emphasized abstinence from interference at the stage of issuance of show cause notice and need to relegate the parties before the authorities concerned unless a clear case for lack of jurisdiction or abuse of process of law is made out.

13. The courts, however, have discretion to entertain the writ petitions where there are allegations of inherent lack of jurisdiction, or abuse of process of law is alleged. However, as observed there have been occasions when courts have relegated

parties to raise objection on the question of existence of jurisdictional facts, before the authority concerned rather than entertaining the writ petition at the threshold. It is possible that after some investigation or on furnishing of documents further proceedings may be dropped. Even on jurisdictional questions, authorities with limited jurisdictions can form a tentative opinion, though final word vests with Courts. Recently in Hindustan Steel Works Construction Ltd. and Another Vs. Hindustan Steel Works Construction Ltd., Employees Union, it was held that when the dispute relates to enforcement of a right or obligation under the statute and a specific remedy is, therefore, provided under the Statute, the High Court should not deviate from the general view and interfere under Article 226 except when a strong case is made out for making departure. The person who insists upon such remedy can avail of the process as provided under the Statute.

14. The Delhi High Court in Pennwalt (I) Ltd. and Another Vs. Monopolies and Restrictive Trade Practices Comm. and Others, had examined the contention whether MRTP Commission before issuing direction u/s 11(1) of the Act is required to issue notice and comply with the rule of audi altrem partem. Interpreting Section 11(1) of the Act, it was held that it is discretionary and an enabling provision in view of the word ''may'' used in the said Section. It is not obligatory for the MRTP Commission to have a preliminary investigation caused in each case and discretion vests with the said Commission though it is axiomatic that the same should be exercised judicially. The rule of audi altrem partem is not attracted at this stage as the provisions of the Act do not super-impose any obligation to issue prior notice and hearing before initiation of preliminary investigation. That right a party will have in case full-fledged enquiry is initiated. It was further observed that the petitioner therein can answer the show cause notice and raise objection regarding jurisdiction and in the event of an adverse decision, assail the same in appropriate proceedings but a writ petition should not be entertained against a notice issued by a competent statutory authority.

15. It may be appropriate here to mention that the Directorate has along with their counter affidavit filed letter dated 22nd September, 2008 written the MRTP Commission directing the said Directorate to conduct and submit a preliminary investigation report u/s 11(1) of the Act on the basis of the same article. The petitioner has not specifically questioned and challenged the said direction issued by MRTP Commission and the letter dated 22nd September, 2008.

16. It may be interesting to note that the All-India Float Glass Manufactures Association had earlier invoked jurisdiction of MRTP Commission making allegations that the importers of float/flat glass had indulged in under-invoicing and had violated provisions of the Act by resorting to restrictive trade and unfair trade practices and had succeeded before the MRTP Commission. The order of MRTP Commission was set aside by the Supreme Court in Haridas Exports Vs. All India Float Glass Mfrs. Association and Others, holding that the provisions of

Anti-Dumping Act and the Act are separate and operate in different fields and authorities under one Act do not have jurisdiction to examine violation of the other Act. It was also observed that incorporation of anti-dumping provisions in the Customs Act, 1962 do not in any way affect or oust the jurisdiction of MRTP Commission to enquire into and pass orders, inter alia, with regard to restrictive trade practices in India. MRTP Commission, therefore, can go into and enquire into violation of the provisions of the Act, regardless of orders passed under the Import Control Act, Customs Tariff Act or Anti-Dumping Act.

17. The petitioners have option and can raise questions on allegations made in the article published in the Outlook Business magazine dated 6th-19th April, 2008 before the Directorate but it will not be appropriate for this Court to quash the notice itself on the sole ground that anti-dumping duty has been imposed against importers. Imposition of anti-dumping duty against importers does not in any way close or answer the allegations of cartelization by companies manufacturing float/flat glass in India. The said article also quotes orders passed by European Commission on some companies imposing penalties/fine in view of cartelization in Europe.

18. Learned Counsel for the petitioner during the course of hearing submitted that some of the information sought for invades right to privacy and my attention was also drawn to Section 49 of the Act, which provides for penalties for offences for failure to furnish information/documents. Section 49 of the Act reads as under:

49. Penalty for Offences in Relation to Furnishing of Information.

(1) If any person fails, without any reasonable excuse, to produce any books or papers, or to furnish any information, required by the Director General u/s 11, or to furnish any information required u/s 43 or to comply with any notice duly given to him u/s 42, he shall be punishable with imprisonment for a term which may extend to three months, or with fine which may extend to two thousand rupees, or with both, and where the offence is a continuing one, with a further fine which may extend to one hundred rupees for every day, after the first, during which such failure continues.

(2) If any person, who furnishes or is required to furnish any particulars, documents or any information-

(a) makes any statement or furnishes any document which he knows or has reason to believe to be false in any material particular; or

(b) omits to state any material fact knowing it to be material; or

(c) willfully alters, suppresses or destroys any document which is required to be furnished as aforesaid. He shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five thousand rupees, or with both.

19. Section 49(1) of the Act may not require mens rea but states that no punishment can be imposed unless a person has failed to produce books or papers or furnish information "without reasonable excuse." Failure to furnish information or supply documents/papers is not sufficient to impose punishment. No punishment can be imposed if there is a reasonable excuse for not furnishing documents/papers or information. It is open to the petitioners to raise objections and plead invasion of right to privacy in respect of some of the documents or information. It will be open to the respondent-Directorate to accept or reject the said plea after recording his finding and reasons. The respondent-Directorate is expected to act in a just and a fair manner and in case of violation of any right, it will be open to the petitioner to question and challenge the said direction/order. It will not be appropriate for this Court to entertain the present writ petition on the presumption that the respondent-Directorate will act arbitrarily and reject even meritorious contention of the petitioner relying upon the right to privacy. Right to privacy is not an absolute right and has its limitations and one of them being larger public interest. I, therefore, need not dwell deeper into this aspect as it is open to the petitioners to raise objection in specific cases against specific queries/information and the respondent-Directorate will examine each case on merits and pass an order accepting or rejecting the contention of the petitioner. I may note that similar order was passed with the consent of the parties in a connected matter being W.P. (C) No. 8747/2008 filed by All-India Flat Glass Manufacturers Association.

20. The petitioners have relied upon S.N. Mukherjee Vs. Union of India, in support of the contention that an administrative authority exercising quasi judicial function must record reasons for its decision and this secures fair play in action. The said observations do not assist and are not relevant as only preliminary investigation is in progress and notice seeking information and documents, has been issued. Quasi judicial proceedings have not yet been initiated by issue of notice u/s 10 of the Act. In Indian National Congress (I) Vs. Institute of Social Welfare and Others, distinction between quasi judicial proceedings and administrative proceedings has been noticed and it was pointed out that quasi judicial proceedings have an element of lis or contest between two contesting parties, but there can be other instances when proceedings before a statutory authority are quasi judicial in nature. This happens when a statutory authority is required by the statute to act judicially and give a decision imposing liability or affecting rights. Applying the ratio of the said decision, issue of notice asking for information or proceedings for preliminary investigation u/s 11(2) of the Act cannot be regarded as a quasi judicial decision. As explained, no decision has been pronounced and only fact finding enquiry is in progress. There is no adjudication, adverse finding or determination of rights. In Canara Bank and Others Vs. Shri Debasis Das and Others, , the Supreme Court has noticed that there is gradual blurring and weathering away of distinction between a quasi judicial act and an administrative act. Even administrative order may have civil consequences as it can encompasses infraction of not merely property or personal rights but civil

liberty, material deprivation and non-pecuniary damages. It was emphasized that there should be fair play in action. Right to conduct preliminary investigation is granted to the Directorate under the Act. As of now, no order has been passed by the Directorate rejecting or accepting the pleas of right to privacy raised by the petitioner. I do not think it will be appropriate for this Court to question and quash the notice itself on the ground that it may have an adverse civil consequence. In case there is cartelization by the glass manufactures, certainly the matter should be investigated. It will not be just and fair to prevent even a preliminary investigation into the allegations. It will be premature at this stage to decide whether there is cartelization or not and whether there is violation of right to privacy as the respondent-Directorate has been asked to pass a speaking order dealing with the plea of the petitioner in respect of each document/information. It is possible that the petitioner may produce some documents and information, and the respondent directorate may drop further proceedings observing that the allegations are untrue and sham and therefore it is not necessary to proceed further and ask for more documents and information. In Rajesh Kumar and Others Vs. D.Commissioner of Income Tax and Others, , the Supreme Court was concerned with Section 142(2-A) of the Income Tax Act, 1961 directing special audit of accounts of the assessee. It was observed that the said order has adverse civil consequences as the assessee is burdened with requirement to undergo a second audit and also pay the special auditor. Reference was also made to the jurisdictional requirement or pre condition specified in the Section that the nature of the accounts should disclose complexity and special audit should be in the interest of revenue. In the present case, there is no such adverse order or requirement of existence of jurisdictional facts in Section 11(2) of the Act. It may be noted that the observations of the Supreme Court in the said judgment have to be read along with three Bench decision of the Supreme Court in Sahara India (Firm), Lucknow Vs. Commissioner of Income Tax, Central-I and Another,

21. Decision in Chairman, Disciplinary Authority, Rani Lakshmi Bai Kshetriya Gramin Bank Vs. Jagdish Sharan Varshney and Others, is also not applicable. In the said case, an employee was charge sheeted and found guilty after enquiry was held and punishment was imposed. The appellate authority dismissed the appeal of the employee against punishment without giving any reason whatsoever. It was observed that the appellate authority need not give elaborate reasons while confirming the decision but there should be at least some indication of reasons even in case of affirmation. In the present case, no order of punishment or finding of fact against the petitioner has been recorded or made.

22. In view of the above, I do not find any merit in the present writ petition and the same is dismissed. In the light of the above, I do not see any reason to quash the two impugned letters dated 17th September, 2008 and 19th November, 2008. It will be, however, open to the petitioners to raise objection and pleas against furnishing and supply of particular information or document and the respondent-Directorate

will examine and pass a speaking order accepting or rejecting the contention/plea. The petitioner will be entitled to ventilate the grievance, if any in case of adverse direction and rejection of the plea. Observations and findings recorded above are for the disposal of the present writ petition and will not influence the respondents. In the facts and circumstances of the case, there will be no order as to costs.